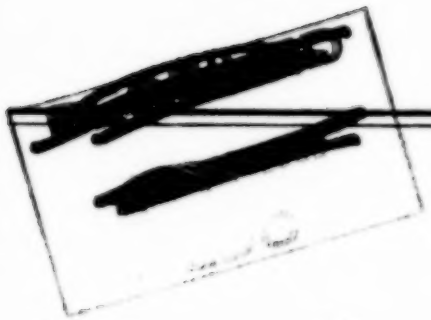

No. 00-1853

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AKOS SWIERKIEWICZ,

Petitioner,

—v.—

SOREMA, N.A.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a plaintiff alleging national origin and age discrimination is required to plead factual allegations which raise an inference of discrimination in order to avoid dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

CORPORATE DISCLOSURE STATEMENT

Respondent Sorema, N.A. is wholly owned by SCOR U.S. Corp., a privately held company.

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St. Mary's Honor Ctr. v. Hicks,
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OTHER AUTHORITIES

Advisory Committee On Rules For Civil Procedure, Report On Proposed Amendments To The Rules (1955), *reprinted in* 12A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure (2001)*, App. F... ..... 9, 11, 12

2 Bender's Federal Practice Forms (1991) 26

Black's Law Dictionary (7th ed. 1999) 7

John F. Buckley & Michael R. Lindsay, *Defense Of Equal Employment Claims* § 17.09 (2d ed. 1995) 24

Charles E. Clark, *Handbook Of The Law Of* Code *Pleading* (2d ed. 1947) 11

136 Cong. Rec. 22011 (1990) 37

EEOC Enforcement Statistics And Litigation, http://www.eeoc.gov/stats 35

EEOC: Federal Laws Prohibiting Job Discrimination: Q&A, http://www.eeoc.gov/facts/qanda.html 31

Cynthia L. Estlund, *The Workplace In A Racially Diverse Society: Preliminary Thoughts On The Role Of Labor And Employment Law*, 1 U. Pa. J. Lab. & Emp. L. 49 (1998) 38

Christina D. Henagen, *Note: False Claims Of Sexual Harassment In Education: The Path To An Appropriate Remedy For The Wrongly Accused*, 76 Wash. U. L.Q. 1431 (1998) 38

Fleming James, Jr., Geoffrey C. Hazard, Jr. & John Leubsdorf, *Civil Procedure* §§ 1.6, 3.6, 3.11 (5th ed. 2001) 8, 16, 26

9 Lex Larson, *Employment Discrimination*, Practice Forms (2d ed. 1998) 26

Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 Tex. L. Rev. 1749 (June 1998) 46

2 James Wm. Moore *et al.*, *Moore's Federal Practice* § 12.34 (3d ed. 2000) 16, 28

The Oxford English Dictionary (2d ed. 1989) 27

U.S. Department Of Justice, Bureau Of Justice Statistics, Special Report: *Civil Rights Complaints in U.S. District Courts, 1990-1998*, Fig. 1 (Jan. 2000, updated Dec. 12, 2001) 35

Webster's Collegiate *Dictionary*, 10th ed. (1996) 27

Jack B. Weinstein & Daniel H. Distler, *Comments On Procedural Reform*, 57 Colum. L. Rev. 518 (1957) 10

Thomas E. Willging et al., *An Empirical Study Of Discovery And Disclosure Practice Under The 1993 Federal Rule Amendments*, 39 B.C. L. Rev. 525 (1998) 37

5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1357 (2d ed. 1990) 16

5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* §§ 1202, 1216, 1220 (2d ed. 1990) 10, 11, 14

8 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2071 (2d ed. 1994) 33

STATEMENT OF THE CASE

Petitioner brought this discrimination action alleging that his employment had been terminated on account of his national origin in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and his age in violation of the Age Discrimination in Employment Act of 1967 (the "ADEA"). The district court dismissed petitioner's complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim because petitioner offered only conclusory allegations and did not allege any facts indicating that the termination of his employment was discriminatory. The court of appeals affirmed.

The complaint alleged that Sorema, N.A. ("Sorema") was a New York-based reinsurance company that was formed in 1989. Petitioner was hired in April of 1989 as a senior vice president. At the time, petitioner, who was of Hungarian descent, had been a United States citizen for almost 20 years and was 42 years old. Sorema's chief executive officer was François M. Chavel, a French national who was petitioner's age. (J.A. 20a, 24a, ¶¶ 5, 6, 12, 13, 14, 17).

The complaint further alleged that in February 1995, Mr. Chavel made changes at Sorema that affected petitioner's job responsibilities. Certain of petitioner's underwriting responsibilities were transferred to Nicholas Papadopoulo, a 32-year-old French national of Greek heritage, and petitioner was given additional marketing and services responsibilities. At the time of the transition, Mr. Chavel stated that he wanted to

"energize" the underwriting department. (J.A. 20a-21a, 25a, ¶¶ 19, 23).

The complaint further alleged that more than two years later, in April 1997, petitioner wrote a memorandum to Mr. Chavel outlining his grievances with the company. In the memorandum, petitioner complained about his difficulties in working with Mr. Papadopoulo and other employees, and his dissatisfaction with the company. Petitioner concluded that "[b]ecause of the untenable work environment", he had "no other choice but to leave the company", and demanded a severance package. The memorandum did not complain about any discrimination against petitioner, nor did it mention petitioner's national origin or age. After sending the memorandum to Mr. Chavel, petitioner "cleared out" all of his personal belongings from his office. (J.A. 20a, 26a, 34a-36a, ¶ 31).

The complaint further alleged that as a result of petitioner's "hostile" actions, Mr. Chavel gave petitioner the choice of resigning or having his employment terminated. Petitioner "opted to be terminated" and, consequently, his employment ended on April 29, 1997. (J.A. 20a, 33a, ¶¶ 33-35).

In July 1997, petitioner filed a charge of discrimination, based solely on the termination of his employment, with the Equal Employment Opportunity Commission (the "EEOC") (J.A. 18a-21a).

In August 1999, petitioner commenced this action for national origin discrimination under Title VII and for age discrimination under the ADEA in

connection with the termination of his employment (J.A. 4a-12a).

Sorema moved to dismiss the complaint, pursuant to Rule 12(b)(6), on the grounds that petitioner's claims (i) were barred by the statute of limitations, and (ii) failed to state a claim upon which relief can be granted (J.A. 13a-14a).

In response to Sorema's motion, petitioner filed an amended complaint that added claims under the New York State and City anti-discrimination laws. The amended complaint was otherwise identical to the complaint.[1] (J.A. 22a-30a).

At the oral argument of the motion to dismiss, petitioner's counsel agreed that petitioner's claims were based only on his April 1997 termination of employment. The district court ruled that petitioner had failed to state a claim for relief in that he "ha[d] not adequately alleged circumstances that support an inference of discrimination" (J.A. 38a, 42a).

After entry of the district court's judgment, petitioner's counsel sought to amend his complaint, and add another conclusory allegation. The court responded that "[b]ecause counsel was unable to state any additional facts . . ., any amendment would be futile". (J.A. 45a).

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[1] All references to the "complaint" include both the initial complaint and the amended complaint, since their substantive allegations are the same.

The court of appeals affirmed. The court stated that "a complaint consisting of no more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts, fails to state a claim under Rule 12(b)(6)". The court found that petitioner had not pled circumstances that would raise an inference of discrimination, and that such requirement did not constitute a form of heightened pleading. (J.A. 48a-49a).

SUMMARY OF ARGUMENT

In this case, the Court must decide whether a plaintiff who could not allege any factual basis for his discriminatory discharge claims and who admitted that he needed discovery in order to state a claim should be permitted to proceed further. As held by both the court of appeals and the district court, the answer, clearly, is no.

Petitioner's claims were dismissed pursuant to Rule 12(b)(6). His complaint asserted, in wholly conclusory terms, that Sorema terminated his employment because he was Hungarian and because he was 50 years old. However, the factual allegations in the complaint did not support petitioner's conclusion, and showed that discrimination had nothing to do with the termination of petitioner's employment.

Petitioner would like to use the federal anti-discrimination laws against Sorema. Those laws do not prevent an employer from terminating the employment of an employee who admits he is "burnt out" and has no interest in working for it any longer. The Federal Rules provide for the prompt

dismissal of precisely this type of case -- where the facts, taken as true, do not show that the plaintiff is entitled to relief. Petitioner would ignore his factual allegations and rely on his ultimate legal conclusion -- in effect, eviscerating Rule 12(b)(6) in employment discrimination cases, and permitting such cases to proceed to discovery simply because the plaintiff invokes the magic word, "discrimination", in the complaint.

The Federal Rules require a complaint to set forth allegations showing that the plaintiff is entitled to relief. *See* Fed. R. Civ. P. 8(a) (a pleading should contain "a short and plain statement showing that the pleader is entitled to relief"); Fed. R. Civ. P. 12(b)(6) (a complaint may be dismissed "for failure to state a claim upon which relief can be granted"); *see also* Fed. R. Civ. P. 1 (The Rules "shall be construed and administered to secure the just, speedy and inexpensive determination of every action"). The language of the rules is clear -- a plaintiff must make a showing that he is entitled to relief in order to survive a motion to dismiss. Petitioner's complaint did not make any such showing.

In a discriminatory discharge case under Title VII and the ADEA, a plaintiff must put forth some allegations showing that there was discrimination in connection with termination of his employment. The *prima facie* case articulated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), provides an appropriate guideline by which to assess the sufficiency of a discrimination complaint. On a Rule 12(b)(6) motion to dismiss, the *prima facie* case does not require evidence or

proof, but only minimal allegations supporting an inference of discrimination. As such, it is not a rigorous or heightened pleading standard. However, there must be some reason to infer discrimination. Petitioner's complaint presented no such reason.

Because an inference of discrimination is not difficult to show, a plaintiff does not need discovery. The Federal Rules do not contemplate pre-action discovery in order to permit a plaintiff to find a claim. Moreover, prior to commencing an action, a Title VII and ADEA plaintiff already has had the benefit of an investigation by the EEOC.

Compelling a plaintiff who claims discrimination to meet a minimum pleading standard accords with the policies behind Title VII and the ADEA. Federal courts are inundated with employment discrimination claims, and the numbers are increasing. Dissatisfied employees, like petitioner, frequently bring claims of discrimination that have no merit. This adversely affects employers and their employees, who must defend themselves; the courts, which must adjudicate such claims; and employees with legitimate claims, who deserve prompt justice.

ARGUMENT

I

THE FEDERAL RULES REQUIRE THE COMPLAINT TO SHOW THAT THE PLEADER IS ENTITLED TO RELIEF

The plain language of the Federal Rules as well as the history behind them make clear that a pleading must contain some information showing

that the plaintiff is entitled to relief. The Rules mandate dismissal of complaints, including complaints alleging a violation of the federal anti-discrimination laws, where, as here, the plaintiff offers only conclusory allegations of wrongdoing and the facts did not show any violation. This is not a heightened pleading standard, as petitioner asserts (Pet. Br.13), but rather the ordinary application of well-settled pleading rules.

A. The Plain Language And History Of The Federal Rules Require A Plaintiff To Show An Entitlement To Relief.

Rule 8(a) calls for a "short and plain statement *showing* that the pleader is entitled to relief" (emphasis added). Likewise, Rule 12(b)(6) provides for dismissal of a complaint for "failure to state a claim upon which relief can be granted". These Rules mean what they say: a plaintiff must state a claim showing that he is entitled to relief.

The language of the Rules is the primary, and most reliable, indicator of their meaning. This Court has recognized that, "'[w]e give the Federal Rules of Civil Procedure their plain meaning'. As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous". *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 540-41 (1991) (citation omitted).[2]

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[2] The plain meaning rule is an elementary canon of textual interpretation and provides that, "[w]ords should be read as saying what they say". *Black's Law Dictionary* (7th ed.

(Continued...)

According to the clear and unambiguous language of these Rules, a pleading must contain some "showing" that the plaintiff is "entitled to relief". Fed. R. Civ. P. 8(a). It is not enough for a complaint merely to announce its ultimate conclusion or to affix such conclusion to a set of inefficacious facts. Rather, a complaint must make a threshold showing sufficient to "state a claim upon which relief can be granted". Fed. R. Civ. P. 12(b)(6). If it does not, the complaint should be dismissed.

Legal scholars agree that a plaintiff must show an entitlement to relief. Professors James, Hazard and Leubsdorf point out that if this threshold showing is not required, then "[i]t would have been more appropriate to require only that the pleading state that there is 'reason to believe that, upon evidence which may be disclosed by discovery, the pleader may be entitled to relief". Flemming James, Jr., Geoffrey C. Hazard, Jr. & John Leubsdorf, *Civil Procedure* § 3.6, at 189 (5th ed. 2001). Of course, the Rules say no such thing.

Petitioner wholly ignores Rule 12(b)(6), as well as the part of Rule 8(a) providing for a "showing that the pleader is entitled to relief". He focuses only on the "short and plain statement", and argues that "the goal of Rule 8(a)(2) is simplicity of pleadings" (Pet. Br. 14). "Simplicity" does not mean that basic pleading standards do not apply. The Rule compels a plaintiff to set out his facts plainly and directly,

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1999) at 1170.

but also requires a showing of the grounds on which the claim rests. This is where petitioner's complaint, notwithstanding its length, failed.

The historical development of pleading under the Federal Rules illuminates their plain meaning. Prior to the adoption of the Federal Rules in 1938, federal district courts in civil actions applied the procedural rules of the state in which they were located. *See* Conformity Act of 1872, c. 255 § 5, 17 Stat. 197; Rev. Stat. § 914. Some states employed pleading standards developed at common law, which mandated the inclusion of highly-stylized and formulaic language in complaints. Other states used code pleading pursuant to which a complaint had to allege facts and could not allege claims, causes of action or legal conclusions. Still other states adopted some hybrid of these methods. *See generally* Charles E. Clark, *Handbook Of The Law Of Code Pleading*, 23-31 (2d ed. 1947). There was significant variation and confusion in federal pleading.

The fundamental problem with these methods was that purely technical defects or missteps in pleading would lead to dismissal of complaints. The Federal Rules were designed to remedy this problem as well as to simplify, and bring consistency to, federal pleading. *See* 1955 Report Of The Advisory Committee Proposed Amendments To The Rules of Civil Procedure For The United States District Courts, *reprinted in* 12A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* (2001), App. F., note to Rule 8(a)(2) ("[T]he rules are designed to discourage battles over mere form of statement and to sweep away the needless

controversies which the codes permitted, that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement"); *Conley v. Gibson*, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome").

Petitioner does not contend that his complaint was dismissed on a technicality or because of a mistake by his attorneys. His argument is that the courts below, in looking for some facts that would support an inference of discrimination and in not deferring to his "naked assertions", improperly returned to former practice (Pet. Br. 19). This argument is incorrect because the Federal Rules were not intended to, and do not, relieve a plaintiff from the threshold requirement of alleging some non-conclusory information that would support a cognizable legal theory. *See* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1202, at 72 (2d ed. 1990). ("[T]he rules do contemplate that the pleadings will refer to the occurrences sued upon and that they will show that the pleader has a claim on which he is entitled to relief. Federal civil pleading differs from the 'fact pleading' of the codes principally in the degree of generality with which the elements of the claim may be stated"); Jack B. Weinstein & Daniel H. Distler, *Comments On Procedural Reform*, 57 Columb. L. Rev. 518, 523 (1957) ("[T]he allegations made must indicate some probability that the transaction, if it occurred as stated, supports a right to legal relief").

The principal architect of the Federal Rules, Charles E. Clark, made the same point describing common law and code pleading as extremes, and characterizing pleading under the Federal Rules as "giving some facts", so as to present "a very broad issue". Clark, *supra*, at 56.

The drafters of the Federal Rules understood that the Rules required a plaintiff to provide "some facts". In 1952, the Advisory Committee on the Federal Rules was presented with an amendment that would have added to the "short and plain statement of the claim", a requirement that it "contain the facts constituting a cause of action". 5 Wright & Miller, *supra*, § 1216, at 164–65.[3] The proposal was rejected -- not because it was unsound -- but because it was unnecessary in that Rule 8(a) already called for factual information. The Advisory Committee explained that the proposed amendment

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[3] The proposed amendment was, in part, a misplaced response to *Dioguardi v. Durning*, 139 F.2d 774, 774-75 (2d Cir. 1944), which upheld a *pro se* plaintiff's "obviously home drawn" and inartfully drafted complaint. Like petitioner (Pet. Br. 15), "[s]ome of the critics have read the *Dioguardi* case as meaning that a pleader no longer need set forth facts from which it can be seen that he has a right to relief". 5 Wright & Miller, *supra*, § 1220, at 197. The Advisory Committee disagreed, and recognized that *Dioguardi* was not based on any such holding. To the contrary, "the complaint in that case stated a plethora of facts and the court so construed them as to sustain the validity of the pleading". Advisory Committee Report, *reprinted in* 12A Wright & Miller, *supra*, App. F at 773.

> appear[s] to be based on the view that the rule does not require the averment of any information as to what actually has happened. That Rule 8(a) envisages the statement of circumstances, occurrences, and events in support of the claim presented is clearly indicated . . . It is accordingly the opinion of the Advisory Committee that, as it stands, the rule . . . requires the pleader to disclose adequate information as to the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it.

Advisory Committee Report at 773-74.

Thus, the plain language and history of the Federal Rules demonstrate that a minimal threshold showing, with some facts to support an entitlement to relief, is necessary in order to survive a Rule 12(b)(6) motion to dismiss.

B. Courts Dismiss Complaints Consisting Of Conclusory Allegations That Do Not Show An Entitlement To Relief.

This Court applied Rules 12(b)(6) and 8(a) in the landmark case of *Conley v. Gibson*, 355 U.S. 41 (1957). There, the Court considered the sufficiency of a class action complaint asserting that the Union had failed, in violation of the Railway Labor Act, to "represent Negro employees equally and in good faith". *Id.* at 43. The plaintiffs alleged that they were wrongfully discharged, that their jobs were filled by white employees, and that the Union refused to protect their jobs as it protected jobs of

white employees, or to help plaintiffs with their grievances, all "because they were Negroes". *Id.* at 46.

The defendants moved to dismiss the complaint on the ground that the plaintiffs had not set forth "specific facts", such as the precise provisions of the collective bargaining agreement which allegedly had been violated, the precise duties or obligations allegedly owed by the Union, and the precise actions allegedly taken by the Union to deprive the plaintiffs of their rights. *Conley* Resp. Br. at 7.

The Court rejected any requirement that such "specific" and "detailed" information need be provided. Relying on Rule 8(a), and its directive that a plaintiff give a "short and plain statement of the claim" *and* the "grounds upon which it rests" (355 U.S. at 47), the Court concluded that "[i]f [the plaintiffs'] allegations are proven there has been a manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination". *Id.* at 46.[4]

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[4] The Court characterized this as "simplified notice pleading". 355 U.S. at 47. "Such a label, however well meant, is unfortunate. At best it leads to confusion, for there is no accepted understanding of what the term means, and persons relying on the label are likely to substitute their own varying interpretations of it for the more precise formulations of the federal pleading rules. At worst it has caused unnecessary criticism of the rules from those to whom the label suggests the brief and uninformative notice of an action that commonly is used at the outset of proceedings in small claims courts . . . (Continued...)

In accordance with the Federal Rules and *Conley*, the courts of appeals have unanimously held that, while the Federal Rules do not mandate the pleading of specific or detailed information, they do "require[ ] the pleader to disclose adequate information regarding the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it". 5 Wright & Miller *supra*, § 1202, at 73, *citing Advisory Committee Report*. Complaints that do not show a plaintiff's entitlement to relief, but merely rely upon bare conclusions or facts that do not support such conclusions, are inadequate in every circuit. *See, e.g., DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) ("[T]he price of entry, even to discovery, is for the plaintiff to allege a *factual* predicate concrete enough to warrant further proceedings, which may be costly and burdensome. Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition"); *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996) ("While the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice"); *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) ("[A] court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss"); *Migdal v. Rowe Price-Fleming Int'l, Inc.*, 248 F.3d

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If a label is needed to distinguish pleading under the rules from that of the codes and the common law, 'modern pleading' or 'simplified pleading' would be more appropriate". 5 Wright & Miller, *supra*, § 1202 at 72-73.

321, 326 (4th Cir. 2001) ("Rule 12(b)(6), however, is not without meaning. 'The presence[ ] of a few conclusory legal terms does not insulate a complaint from dismissal under Rule 12(b)(6) when the facts alleged in the complaint' cannot support the legal conclusion"); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000) ("In order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations. We will thus not accept as true conclusory allegations or unwarranted deductions of fact"); *Begala v. PNC Bank, Ohio, Nat'l Ass'n*, 214 F.3d 776, 779 (6th Cir. 2000) ("To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory . . . [M]ore than bare assertions of legal conclusions is ordinarily required to satisfy federal notice pleading requirements"), *cert. denied*, 531 U.S. 1145 (2001); *Fries v. Helsper*, 146 F.3d 452, 457 (7th Cir. 1998) ("At a minimum, a complaint must contain facts sufficient to state a claim as a matter of law, and mere conclusory allegations of a conspiracy are insufficient to survive a motion to dismiss"), *cert denied*, 525 U.S. 930 (1998); *Briehl v. GM Corp.*, 172 F.3d 623, 627 (8th Cir. 1999) ("At the very least, however, the complaint must contain facts which state a claim as a matter of law and must not be conclusory"); *Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001) ("[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss"); *Witt v. Roadway Exp.*, 136 F.3d 1424, 1431 (10th Cir.) ("Without an allegation of some factual occurrence that could

[conceivably] constitute [the claim], the claim must be dismissed"), *cert. denied*, 525 U.S. 881 (1998); *South Florida Water Management Dist. v. Montalvo,*, 84 F.3d 402, 409 n.10 (11th Cir. 1996) ("[C]onclusory allegations and unwarranted deductions of fact are not admitted as true in a motion to dismiss"); *Andrx Pharms., Inc. v. Biovail Corp., Int'l*, 256 F.3d 799, 805 (D.C. Cir. 2001) ("'[T]he court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations'").[5]

To be sure, in assessing a complaint, a court should read the complaint liberally and accept its well-pleaded factual allegations as true. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Moreover, civil rights complaints are subject to the

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[5] The commentators uniformly agree. *See, e.g.*, 2 James Wm. Moore *et al.*, *Moore's Federal Practice* ¶ 12.34[1][b], at 12-61 to 12-63 (3d ed. 2000) ("[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss . . . The plaintiff need not include evidentiary detail, but must allege a factual predicate concrete enough to warrant further proceedings"); 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1357, at 340 (2d ed. 1990) ("[T]he pleader must set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist"); James, Hazard, & Leubsdorf § 3.6, *supra*, at 189 ("If the traditional threshold requirements were not to apply . . . it is difficult to see why the pleading should be required to show that the 'pleader is entitled to relief'").

same standards as other complaints, and there is no requirement of heightened pleading. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). These principles are well-settled and are not at issue in this case.

Petitioner erroneously characterizes the standard employed by the courts below as "heightened" or "strict special" pleading (Pet. Br. 13, 14). The courts did not impose any such standard and did not require plaintiff to plead the details, particulars or specifics of his claim. They merely looked for an allegation that would indicate that discrimination had something to do with the termination of petitioner's employment.

Petitioner also errs in maintaining that conclusory allegations are enough and that "a plaintiff has the duty -- but no more than that is required -- to put the defendant on notice of the nature of his action" (Pet Br. 11). Notice as to the "nature of the action" is, of course, only part of what the Federal Rules mandate. The other part of the Federal Rules, which petitioner overlooks, is that there must be notice of "the grounds upon which [the claim] rests". *Conley*, 355 U.S. at 47. This is precisely where petitioner's complaint failed -- it did not allege any non-conclusory grounds showing that he was entitled to relief.

Dismissal of petitioner's complaint is consistent with this Court's decisions. This Court, too, has refused to accept conclusory allegations and has dismissed discrimination claims where the facts, as alleged, do not show an entitlement to relief. In *Sutton v. United Air Lines, Inc.*, 527 U.S.

471 (1999), the Court looked beyond the conclusory allegation that the plaintiffs were "disabled" within the meaning of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, and dismissed a discrimination complaint on a Rule 12(b)(6) motion. In doing so, the Court affirmed the court of appeals' decision, which held that, "to state a *prima facie* case and survive [the employer's] motion to dismiss, Plaintiffs' vision, in its corrected state must 'substantially limit' their major life activity of seeing. Plaintiffs cannot make this *showing*". *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997) (emphasis added), *aff'd*, 527 U.S. 471 (1999). The Court required the plaintiffs to make viable factual allegations, and did not defer to the complaint's ultimate conclusions.

Thus, a complaint cannot proceed on conclusory allegations alone and must state some facts to support the claim. That petitioner included "five paragraphs in the amended complaint explicitly averring that [he] was fired by Sorema on account of his national origin and age" (Pet. Br. 4) is of no significance whatsoever. Conclusory allegations -- even those repeated five times -- do not state a claim.

II

A DISCRIMINATION COMPLAINT MUST ALLEGE CIRCUMSTANCES SUPPORTING AN INFERENCE OF DISCRIMINATION

In assessing the legal sufficiency of a complaint, a court necessarily must consider the substantive law governing the claim. The court of appeals properly turned to this Court's decision in

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), as a guidepost to determine whether plaintiff was able to state a claim for relief under the anti-discrimination statutes.

The complaint alleged that petitioner's employment was terminated in violation of (i) Title VII, which renders it unlawful "for an employer . . . to fail or refuse to hire or to discharge . . . any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" (42 U.S.C. § 2000e-2(a)(1)), and (ii) the ADEA, which prohibits discrimination against employees over forty with respect to their "compensation, terms, conditions, or privileges of employment" (29 U.S.C. § 623(a)(1)) (J.A. 22a).[6]

Petitioner sought to proceed with a circumstantial case of discrimination under the now-familiar framework set forth in *McDonnell Douglas* and its progeny. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).[7]

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[6] Petitioner's New York State and City claims are governed by the same standards as his federal claims. *See Norville v. Staten Island Univ. Hosp.*, 196 F.3d 89, 95 (2d Cir. 1999).

[7] Federal courts have consistently used *McDonnell* (Continued...)

Under this framework, a plaintiff must first set forth a *prima facie* case of discrimination. If he does so, the employer is required to articulate a legitimate, nondiscriminatory reason for the adverse job action. The plaintiff must then show that the employer's proffered reason is untrue and is instead a pretext for intentional discrimination. *See Reeves*, 530 U.S. at 142-43.

In *McDonnell Douglas*, which involved a claim by the plaintiff that he was not hired because of his race, the Court held that a *prima facie* case could be established by showing:

> (i) that the plaintiff belonged to a racial minority;
>
> (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
>
> (iii) that, despite his qualifications, he was rejected; and
>
> (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Douglas in analyzing age discrimination claims. *See Reeves*, 530 U.S. at 141-42; *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 n.2 (1996). This Court has assumed, without deciding, that the *McDonnell Douglas* framework applies to claims under the ADEA. *See Reeves*, 530 U.S. at 142; *O'Connor*, 517 U.S. at 311.

McDonnell Douglas, 411 U.S. at 802.

Since *McDonnell Douglas*, the *prima facie* elements have been refined to apply to differing factual situations in which a plaintiff alleges employment discrimination. The most common and generalized formulation is the one used by the court of appeals:

> (i) membership [in a protected group];
>
> (ii) qualification for the job in question;
>
> (iii) an adverse employment action; and
>
> (iv) circumstances that give support to an inference of discrimination.

(J.A. 48a).[8]

As shown below, the court of appeals was correct to look to *McDonnell Douglas* for guidance in assessing the sufficiency of petitioner's complaint. In so doing, the court did not hold petitioner to all of the elements of his case, which would include a showing of pretext. The court did not even hold petitioner to all of the elements of his *prima facie* case but rather confined its inquiry to the fourth

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[8] There can be no doubt that this formulation accords with *McDonnell Douglas*. *See O'Connor*, 517 U.S. at 312 (recognizing that the *prima facie* case requires information "*adequate to create an inference that an employment decision was based on an illegal discriminatory criterion*"); *Burdine*, 450 U.S. at 253 (noting that *prima facie* case entails "circumstances which give rise to an inference of unlawful discrimination").

prong, which is the essence of any discrimination claim (J.A. 48a). This lenient application of the *prima facie* standard -- which is itself *de minimis* -- is correct on a motion to dismiss.

A. The *Prima Facie* Elements Are Considered On A Motion To Dismiss An Employment Discrimination Claim.

Contrary to petitioner's assertion (Pet. Br. 18), courts properly refer to the *prima facie* criteria in determining the adequacy of a complaint on a motion to dismiss pursuant to Rule 12(b)(6).

This Court has done so. In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), the Court assessed the sufficiency of an employment discrimination complaint under Rule 12(b)(6). The complaint alleged that:

> On September 26, 1970, petitioners, both white, and Charles Jackson, a Negro employee of Santa Fe, were jointly and severally charged with misappropriating 60 one-gallon cans of antifreeze which was part of a shipment Santa Fe was carrying for one of its customers. Six days later, petitioners were fired by Santa Fe, while Jackson was retained.

427 U.S. at 276. The employer moved to dismiss on the grounds that these allegations failed to state a claim and that the "petitioners were required to plead with 'particularity' the degree of similarity between their culpability in the alleged theft and the involvement of the favored coemployee". *Id.* at 283,

n.11. The Court rejected this argument, and relied upon *McDonnell Douglas* in holding that the "precise equivalence in culpability between employees is not the ultimate question: as we indicated in *McDonnell Douglas*, an allegation that other 'employees involved in acts against (the employer) of comparable seriousness . . . were nevertheless retained . . .' is adequate to plead an inferential case" (*id.*). *See also id.* at 282 ("We find this case indistinguishable from *McDonnell Douglas*").[9]

Santa Fe makes clear that circumstances giving rise to an inference of discrimination must be alleged in a discrimination complaint in order to survive a motion to dismiss. *Santa Fe* also teaches that this standard, grounded in *McDonnell Douglas*, is not an onerous or heightened one. The *Santa Fe* plaintiffs, unlike petitioner, satisfied the standard in a few sentences -- alleging that they were discharged for engaging in the same type of activity as a black employee who was retained. The complaint here, which is considerably more prolix, did not identify any similarly situated employees who were retained while petitioner was let go.

In *Delaware State College v. Ricks*, 449 U.S. 250, 257 (1980), the Court also dismissed a

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[9] The employer also argued that the complaint should be dismissed because "the principles of *McDonnell Douglas* are inapplicable where the discharge was based . . . on participation in serious misconduct or crime directed against the employer" (*id.* at 283). The Court rejected this argument as well, and held that the principles of *McDonnell Douglas* are applicable on a motion to dismiss.

discrimination complaint on a Rule 12(b)(6) motion where the plaintiff's allegations did not raise an inference of discrimination. In *Ricks*, a college professor alleged that he was denied tenure and then discharged because of his national origin. The Court found that the allegations concerning the plaintiff's discharge were insufficient to state a claim because "nothing in [them] alleges *any fact suggesting discrimination* in the termination of [the plaintiff's] employment". *Id.* at 257 n.8 (emphasis added). The Court concluded there was no inference of discrimination, even though, as it noted, "[s]ixteen paragraphs in the complaint describe in detail the sequence of events surrounding the tenure denial. Only one paragraph even mentions Ricks' eventual departure". *Id.* at 257 n.8.

So too, petitioner's claim that his "nine page amended complaint" (Pet. Br. 5) contained enough facts misses the point. It is not the number, but rather the substance, of the allegations that determines whether a complaint is adequate.

This Court's use of *McDonnell Douglas* in assessing the sufficiency of a complaint shows that petitioner's position is incorrect. The *prima facie* case is not merely an evidentiary standard (Pet. Br. 18). To the contrary, the *prima facie* case provides important guidance on a motion to dismiss in determining whether the facts, as alleged, state a viable claim of discrimination. *See* John F. Buckley, Michael R. Lindsay, *Defense Of Equal Employment Claims* § 17.09, at 17-12 to 17-13 (2d ed. 1995) ("The plaintiff's failure to allege a prima

facie case in the complaint provides [an] avenue for a motion to dismiss").

The courts of appeal also employ the *McDonnell Douglas prima facie* case on a Rule 12(b)(6) motion, or look for some other nonconclusory showing of discrimination. For example, in *Jackson v. City of Columbus*, 194 F.3d 737, 751 (6th Cir. 1999), the court looked to *McDonnell Douglas* to dismiss a complaint that "failed to allege that [the plaintiff] suffered an adverse employment action (the third prong) and also failed to establish that similarly situated non-minority employees were treated differently (the fourth prong)". *See also Brown v. Coach Stores, Inc.*, 163 F.3d 706, 709-10 (2d Cir. 1998); *Terry v. Cook*, 866 F.2d 373, 379 (11th Cir. 1989); *Fisher v. Flynn*, 598 F.2d 663, 665 (1st Cir. 1979).

None of petitioner's cases eliminate the requirement that a plaintiff "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests", as required by *Conley*. *See* Pet. Br. 18-19. As explained by the Ninth Circuit in *Ortez v. Washington*, 88 F.3d 804, 808 (9th Cir. 1996), "a plaintiff need not make a *prima facie* showing to survive a motion to dismiss *provided he otherwise sets forth a short and plain statement of his claim showing that he is entitled to relief*" (emphasis added). That a plaintiff must make some showing of discrimination obviously comports with the pleading standards set by Congress and the courts, and applied in the case at bar.

It is also significant, as petitioner points out (Pet. Br. 17), that the EEOC requires that a charge filed with it provide a "clear and concise statement

of the facts, including pertinent dates, *constituting* the alleged unlawful employment practices". 29 C.F. R. § 1626 8(a)(3) (emphasis added). Petitioner (and the EEOC, through its *amicus* participation in this case) would deny this same information to a defendant in federal court.

Likewise, model forms for discrimination complaints contain allegations upon which a court may infer discrimination. *See, e.g.*, 2 Bender's *Federal Practice Forms*, Form No. 8:381 (1991); *Id.*, Form No. 8:401; 9 Lex Larsen, *Employment Discrimination*, Practice Forms, Form IV-8 (2d ed. 1998).[10]

Thus, an inference of discrimination must arise from the factual allegations of a complaint in order for it to state a claim and survive a motion to dismiss.

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[10] Petitioner relies on a form complaint alleging the negligent operation of a motor vehicle (Pet. Br. 16). This form is inapposite. When a car injures an individual crossing the street, there is good reason to infer that it was operated negligently. By contrast, when an at-will employee is discharged, there is no reason to infer that he was discriminated against. This is why further information must be alleged. *See* Flemming James Jr., Geoffrey C. Hazard Jr., John Leubsdorf, *Civil Procedure* § 3.11, at 203 (5th ed. 2001) ("Another factor . . . is the extent to which a party's claim of what happened deviates from what usually happens . . . The party who claims the unusual occurrence can be required to plead it affirmatively so that the usual assumptions may be indulged as a matter of course when there is no such unusual circumstance").

B. A *Prima Facie* Case Is Flexible And Not Onerous.

The *prima facie* elements, of which the inference of discrimination is most critical, do not create an elevated pleading standard but provide a sound means to evaluate a discrimination claim. A plaintiff's failure to meet this minimal standard, and allege a reason to infer discrimination shows -- most clearly -- that he cannot state a claim.

The very term "*prima facie*" connotes a low threshold of information. *See The Oxford English Dictionary* 470-71 (2d ed. 1989) (defining "*prima facie*" as: "[a]t first sight; on the face of it; as appears at first without investigation; arising at first sight; based or founded on the first impression"); *Webster's Collegiate Dictionary* 925 (10th ed. 1996) (defining "*prima facie*" as: "at first view; on the first appearance").

Consistent with the term's dictionary definition, the *prima facie* case was developed so that it would be fairly easy for a plaintiff to state. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 253 ("The burden of establishing a *prima facie* case of disparate treatment is not onerous"); *Patterson v. McLean Credit Union*, 491 U.S. at 164 (same).

Moreover, the elements of a *prima facie* case are flexible and can be adapted to conform to the facts of a case. *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) ("The method suggested in *McDonnell Douglas* . . . was never intended to be rigid, mechanized, or ritualistic"). The inquiry is guided by the ultimate issue: whether any of the

circumstances alleged by the plaintiff support an inference of discrimination. *See Id.* at 579-80 ("[W]e infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations").

Petitioner's contention that he was subjected to a more rigorous pleading standard is belied by the decisions below. Both the court of appeals and the district court viewed the *prima facie* case in a manner most favorable to petitioner. They accepted the factual allegations of the complaint, drew all reasonable inferences in petitioner's, and even considered allegations outside of the limitations period (J.A. 38a-39a, 47a-48a).[11] Moreover, the courts assumed the existence of one element, an adverse job action, over Sorema's objection that this element was not alleged because petitioner had effectively resigned. *See* J.A. 48a; 38a. Had the *prima facie* criteria been strictly applied, petitioner's claim should have been dismissed for this reason as

[11] In a further effort to find some basis to sustain petitioner's complaint, the district court also looked at petitioner's April 1997 memorandum and his EEOC charge. Such documents, which are identified by a plaintiff in, and are integral to, the complaint may be regarded on a motion to dismiss. *See* 2 James Wm. Moore *et al.*, *Moore's Federal Practice* ¶ 12.34[2], at 12-69 to 12-70 (3d ed. 2000) ("The courts may consider . . . [u]ndisputed documents alleged or referenced in [the] complaint" in deciding whether to dismiss it).

well.[12] Thus, petitioner was not held to all the elements of a *prima facie* case under *McDonnell Douglas*. Instead, the courts below focused on the more significant defect and ultimate issue -- petitioner's failure to allege anything from which discrimination could be inferred.

An inference of discrimination may arise in any number of ways. For example, it may be shown where an employer accords favored treatment to similarly situated employees outside of the protected class (*McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11); seeks applicants with the plaintiff's qualifications to fill the plaintiff's position after he was discharged (*McDonnell Douglas*, 411 U.S. at 802); or criticizes the plaintiff or other employees in terms derogatory of the plaintiff's protected class (*Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 468 (2d Cir.), *cert. denied*, __ U.S. __, 122 S. Ct. 460 (2001)).

Petitioner did not allege *any* of these circumstances. Instead, his complaint admitted that he had precipitated his own separation from

[12] When an employee resigns, he cannot assert that he suffered an adverse employment action. *See Hammon v. DHL Airways, Inc.*, 165 F.3d 441, 447 (6th Cir. 1999). Courts look to state law in determining whether an employee's actions constitute a resignation under the federal anti-discrimination statutes. *Id.* In this case, a New York state appellate court had already determined that petitioner's "unemployment as of April 29, 1997 was caused by his own actions in voluntarily leaving his employment". *In re Swierkiewicz*, 254 A.D.2d 596, 597, 678 N.Y.S. 2d 812, 813 (3d Dept. 1998).

the company by sending an intemperate memorandum to the president of the company and tendering his resignation. Thus, petitioner failed to come forward with any basis to believe "that in the absence of any other explanation it is more likely than not that [Sorema's] actions were bottomed on impermissible considerations". *Furnco Constr. Corp.*, 438 U.S. at 579-80.[13] Failure to satisfy this minimal standard -- which does not call for "evidence" of pretext or any other proof -- warrants dismissal of petitioner's complaint.

C. A Plaintiff Does Not Need Discovery To Allege An Inference Of Discrimination.

In apparent recognition of his failure to state a claim of discrimination, petitioner argues that he must have, but was precluded from taking, "discovery *necessary* to establish such a case" (Pet. Br. 23; emphasis added). Petitioner proposes that a plaintiff be permitted to bring suit against his employer based on mere speculation that he may have been discriminated against, and then use federal discovery devices to see whether there is any basis for his speculation. This approach is not countenanced by the Federal Rules, and reflects a

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[13] The court of appeals did not require that petitioner's complaint identify all of the circumstances supporting an inference of discrimination. The court, and the district court before it, looked at all of the circumstances alleged by petitioner and found that none of them supported any such inference as a matter of law (J.A. 48a-49a). There was no requirement that petitioner allege everything; all he had to do was allege something.

misunderstanding of the proper role of pleadings and discovery in discrimination actions.

First, to state a claim, a plaintiff is only asked to describe *his* perception of the circumstances (which is then taken as true) from which an inference of discrimination may be drawn. This information is not in the possession of the employer. The plaintiff himself must have a good faith basis for his discrimination claim prior to instituting suit, even if the facts can only be alleged upon "information and belief". Fed. R. Civ. P. 11(b)(3).

Further, a plaintiff claiming a violation of Title VII and the ADEA has superior access to information before filing a complaint than do other private litigants. This is because such a plaintiff must file a charge with the EEOC and obtain a "right to sue letter" prior to commencing his action. 42 U.S.C. 2000e-5(b); 29 U.S.C. § 626(d). When a charge has been filed, an investigation "shall be made by the [EEOC]". 29 C.F.R. § 1601.15(a). In the course of the investigation, the EEOC "may make written requests for information, interview people, review documents, and, as needed, visit the facility where the alleged discrimination occurred. When the investigation is complete, EEOC will discuss the evidence with the charging party or employer, as appropriate". *EEOC: Federal Laws Prohibiting Job Discrimination: Q&A*, http://www.eeoc.gov /facts/qanda.html.

The results of the investigation are also available to a plaintiff through the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* *See* 29 C.F.R. § 1610.7(a)(4) (providing that individuals may

obtain from the EEOC "[m]aterials in field office investigative files related to charges under: Title VII [and] the [ADEA]"). The EEOC must respond to the plaintiff's request within "20 working days after receipt of the request". 29 C.F.R. § 1610.9(a).

Here, the EEOC's investigation resulted in the dismissal of petitioner's charge (J.A. 18a-21a). The EEOC stated that, "[b]ased upon its investigation, the EEOC is unable to conclude that the information obtained establishes a violation of the statutes". *EEOC Dismissal And Notice Of Rights; see also* J.A. 23a, ¶ 9. Petitioner, who was represented by counsel, had access to the EEOC's investigative files. His assertion that he did not "ever have the chance to discover Sorema's reason for his employment termination" is wrong (Pet. Br. 22).[14]

More to the point, however, is that Sorema's legitimate, nondiscriminatory reason had no bearing on petitioner's inability to plead a *prima facie* case.[15] None of the materials that petitioner purports to seek, his "personnel file or the files and records of

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[14] There is no mystery about the circumstances of petitioner's departure; petitioner alleged them in his complaint.

[15] Satisfying the minimal *prima facie* elements does not entail alleging the employer's reason for the adverse employment action, nor does it require an allegation that the reason is a pretext for discrimination. These matters -- unlike the elements of a *prima facie* case -- are reserved for discovery, and summary judgment or trial. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

other employees" (Pet. Br. 22), had anything to do with petitioner's own grounds for believing he was discriminated against and commencing the action.

In addition, the Federal Rules do not permit the type of discovery that petitioner would have -- discovery in order to find out if he has a claim. *See* 8 Charles Alan Wright, Arthur R. Miller et al., *Federal Practice & Procedure* § 2071, at 651 n.5 (2d ed 1994) ("The type of fishing which the rules do not tolerate is fishing before action to try to discover some ground for bringing suit").[16]

The proposition that a plaintiff may proceed past the pleading stage to see if he can unearth a claim in discovery has been consistently rejected. *See, e.g., DM Research, Inc.*, 170 F.3d at 55; *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 739 (9th Cir. 1987).[17]

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[16] This is especially so in light of the recent amendments to the Federal Rules which narrow the scope of discovery. *Compare* current Rule 26(b)(1), Fed. R. Civ. P. (information discoverable if "relevant to the claim or defense") *with* prior rule (information discoverable if "relevant to the subject matter of the action").

[17] The *only* provision in the Federal Rules relating to pre-action discovery is Rule 27, which permits depositions before an action for the sole purpose of "perpetuat[ing] testimony". Rule 27 was not "designed as a means of ascertaining facts for drafting a complaint", and is inapplicable here. *Deiulemar Compagnia di Navigazione S.p.A. v. M/V Allegra*, 198 F.3d 473, 485 (4th Cir. 1999), *cert. denied*, 529 U.S. 1109 (2000). In this respect, the Federal Rules are to be contrasted with state statutes that provide for limited

(Continued...)

Clearly, then, a plaintiff does not need, and is not entitled to, discovery to allege an inference of discrimination.

D. The Requirement That A Complaint Allege An Inference Of Discrimination Furthers The Goals Of The Anti-Discrimination Statutes.

The purpose of Title VII and the ADEA, as well as the other anti-discrimination statutes, is to assure equality of employment opportunities and eliminate discriminatory employment practices. *See McDonnell Douglas*, 411 U.S. at 800. To promote these policies, the courts must be available to those employees who raise legitimate charges of discrimination. Requiring a plaintiff to state a claim of discrimination and plead facts that support an inference of discrimination furthers these goals. A change in the law to permit the conclusory allegation that "I was fired because of my [protected class]" will have the contrary effect. The consequences, which will be significant and adverse, will extend to the courts, the accused employer and its employees, and those plaintiffs who *have* been the victims of discrimination.

Federal courts are flooded with employment discrimination complaints. Civil rights-related cases have increased from approximately 9% of all federal civil cases in 1990 to 16% in 2000. *See* U.S.

"disclosure to aid in bringing an action". *See, e.g.*, N.Y. C.P.L.R. 3102(c) (McKinney Supp. 2001-2002).

Department of Justice, Bureau of Justice Statistics, Special Report: *Civil Rights Complaints in U.S. District Courts, 1990-1998*, Fig. 1 (Jan. 2000, updated Dec. 12, 2001) (on file with Marika F.X. Litras, Ph.D., BJS Statistician). About 57% of the increase in civil rights-related cases over this period was due to complaints related to employment issues, which increased 2 ½ times from 8,413 in 1990 to 23,735 in 2000. *Id.*

Many of these claims are without merit. For example, during fiscal year 2000, the EEOC found "reasonable cause" to believe that there was a violation in only 8.2% of the charges alleging age discrimination under the ADEA and 8.6% of the charges alleging national origin discrimination under Title VII. *See EEOC Enforcement Statistics And Litigation*, http://www.eeoc.gov/stats. There is no doubt that "discrimination is odious but a frivolous or malicious charge of such conduct . . . is at least equally obnoxious". *Carrion v. Yeshiva Univ.*, 535 F.2d 722, 728 (2d Cir. 1976).

The federal district courts, which deal with these cases on a daily basis and are thus most familiar with them, know that the anti-discrimination laws are frequently misused by disgruntled employees. As one District Judge recently stated,

> If a terminated employee wishes to file a discrimination lawsuit, he must have rational reasons that could reasonably support a conclusion that he was terminated *because* he was a member of the protected class, not just dissatisfaction at being fired, confusion

as to the reason, and a hope that discovery will pull something out of the water that could be "spun" as evidence of invidious discrimination. The anti-discrimination laws exist for the important but narrow purpose of preventing employment decisions from being made on the basis of mindless prejudice against irrelevant and immutable characteristics, such as race, gender, and age. They do not exist to provide an alternative means of unemployment compensation, to require employers to treat members of protected classes differently than other employees, or to effect transfers of wealth to the legal profession and disgruntled former employees.

Cicero v. Borg-Warner Automotive, Inc., 163 F. Supp. 2d 743, 751-52 (E.D. Mich. 2001) (emphasis in original). *See also Noyer v. Viacom, Inc.*, 22 F. Supp. 2d 301, 308 (S.D.N.Y. 1998) (It is "ill use of federal discrimination laws to treat them as sharpening stones on which to grind personal axes"); *King v. Georgetown Univ. Hosp.*, 9 F. Supp. 2d 4, 7 (D. D.C. 1998) ("This is another example where the nation's anti-discrimination laws are being misused. Here a U.S. district court is asked to involve itself in a minor internal employee assignment decision").

Permitting claims like petitioner's to proceed only because the phrase "I was fired because of my [protected characteristic]" appears in the complaint would further burden the courts and encourage strike suits. As this Court has recognized, "even a

complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment". *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975). Eliminating Rule 12(b)(6) as a means to dispose of complaints that do not allege facts supporting an inference of discrimination would improperly increase their settlement value.

An employer compelled to defend against such suits faces significant costs, both tangible and intangible. There is, of course, the economic cost in the form of litigation expenses, which are often substantial and can be financially debilitating. Discovery is expensive. Indeed, the costs of discovery typically comprise about half of the total costs of litigation. *See* Thomas E. Willging et al., *An Empirical Study Of Discovery And Disclosure Practice Under The 1993 Federal Rule Amendments*, 39 B.C. L. Rev. 525, 548 (1998).[18]

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[18] In enacting the 1991 amendments to Title VII, 42 U.S.C. § 2000e *et seq.*, Congress declined to include unlimited compensatory and punitive damages because of the potential for misuse of the law and its impact upon employers. *See* 136 Cong. Rec. 22011 (1990) (statement of Rep. Ray, supporter of S. 1745, the Civil Rights Act of 1991) ("Even if they win the case, many small businesses will spend so much money on attorney fees and other associated costs that they will be financially weakened or perhaps put out of business all together."). The same fear arises if Rule

(Continued...)

Furthermore, discrimination is a serious accusation that frequently carries with it drastic consequences for the employer and the individuals charged. *See Carrasco v. New York City Off-Track Betting Corp.*, 858 F. Supp. 28, 30 (S.D.N.Y. 1994) (recognizing that "leveling civil rights charges against anyone carries serious consequences distinct from those accompanying garden-variety tort or breach of contract claims"), *aff'd*, 50 F.3d 3 (2d Cir. 1995); *see also* Cynthia L. Estlund, *The Workplace In A Racially Diverse Society: Preliminary Thoughts On The Role Of Labor And Employment Law*, 1 U. Pa. J. Lab. & Emp. L. 49, 80-81 (1998) ("An accusation of discrimination . . . raises the temperature of an employment dispute and puts the moral reputation of the employer and its agents on the line"). Sustaining a pleading that provides no basis from which to infer discrimination increases the risk that the accused individuals may lose their jobs or may be treated as suspect by other employees, even if they are innocent. *Cf.* Christina D. Henagen, *Note: False Claims Of Sexual Harassment In Education: The Path To An Appropriate Remedy for the Wrongly Accused*, 76 Wash. U. L.Q. 1431, 1440 n.49, n.50 (1998) ("A falsely accused teacher can lose his job as a result of the accusation and investigation or, at the very least, suffer damage to his reputation").

Once impugned, the reputations of an employer and its employees are not readily restored,

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12(b)(6) is rendered meaningless.

even if the claim is later dismissed on summary judgment. A plaintiff should have some legitimate minimal basis for his accusation before subjecting an employer to the lengthy and expensive process of clearing its good name and that of its employees. *See Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 16 (1st Cir. 1989) ("[T]o avoid tarring defendants' reputations unfairly and to prevent potential abuses, we have consistently required plaintiffs to outline facts sufficient to convey specific instances of unlawful discrimination").

Finally, and perhaps most importantly, allowing employment discrimination claims to proceed to discovery on the basis of allegations that are entirely conclusory is unjust to those plaintiffs whose claims have merit. Overburdened federal dockets mean that years may pass before an aggrieved employee is able to present his claim in court. *See Cicero*, 163 F. Supp. 2d at 758 ("Not only are frivolous suits wasteful, expensive and meddlesome to the immediate participants, they prevent plausible discrimination claims from being timely heard, and dissuade those who have actually been wronged from filing suit because of the inordinate length of time it would take to obtain a remedy"). The problem will be exacerbated if the courts are prevented from dismissing a purely conclusory allegation of discrimination on a motion to dismiss.

Thus, important policy reasons support the principle that discrimination claims should be required to satisfy a minimal standard of alleging a factual basis from which discrimination may be

inferred in order to state a claim and entitle a plaintiff to proceed further.

III

PETITIONER'S COMPLAINT DID NOT STATE A CLAIM OF NATIONAL ORIGIN OR AGE DISCRIMINATION

Petitioner's claim was that, in April 1997, Sorema terminated his employment because of his national origin (Hungarian) and age (50) (J.A. 22a-30a). Although this was the only employment decision at issue, petitioner's complaint was devoted, almost exclusively, to events that allegedly occurred years earlier. These time-barred events did not relate to petitioner's termination of employment, and could not be considered in assessing the sufficiency of petitioner's complaint. As found by both courts below, there were no allegations that raised an inference of discrimination with respect to petitioner's termination of employment. Hence, petitioner's complaint did not state a claim for discriminatory discharge.

A. Petitioner's Allegations Were Insufficient To Raise An Inference Of Discrimination.

Petitioner's complaint failed to allege any grounds for his discriminatory discharge claims other than in conclusory terms. The only allegations relating to petitioner's termination of employment were that (i) petitioner sent Mr. Chavel a memorandum "outlining his grievances", none of which had anything to do with his national origin or age; giving notice that he intended to resign; and

requesting a severance package "to resolve his disputes" (J.A. 26a, ¶ 31);[19] (ii) Mr. Chavel "did not respond" to the memorandum (J.A. 27a, ¶ 32); (iii) approximately two weeks later, on April 29, 1997, petitioner met with Mr. Chavel and Sorema's general counsel and was requested to act upon his expressed intention to resign (J.A. 27a, ¶ 33); and (iv) petitioner "refused to resign" and as a result was "fired" by Mr. Chavel (J.A. 27a, ¶¶ 34, 35). There is no hint of discrimination in these allegations.

1. The Complaint Did Not Allege National Origin Discrimination.

There were no grounds to infer that petitioner was discharged because he was Hungarian or because he was not French.

With respect to national origin, petitioner alleged only that (i) he was a United States citizen originally from Hungary (J.A. 24a, ¶ 12); (ii) Mr. Papadopoulo was a "natural born French citizen of Greek heritage" (J.A. 20a-21a, ¶ II); (iii) Mr. Chavel was a "French national" (J.A. 24a, ¶ 14); and (iv) Sorema was a "French owned company" (J.A.

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[19] In the memorandum, petitioner complained that he had "become increasingly frustrated, burnt out and demoralized" and attributed this to the "lack of cooperation, unreasonable demands and constant interference by [Mr. Papadopoulo]" (J.A. 34a). Petitioner enumerated the specific problems he had in getting along with Mr. Papadopoulo and other employees (J.A. 34a-35a), and concluded by announcing his intention to "leave the company" (J.A. 36a). The memorandum did not complain about discrimination, and it did not mention petitioner's national origin or age.

21a, ¶ III.5). The most these allegations suggested was that petitioner was of one national origin and certain of Sorema's employees were of other national origins. Obviously, differing nationalities, standing alone, do not create an inference of discrimination.[20]

Petitioner also named five employees whom he alleged were terminated for cause and were given severance packages, while he was purportedly terminated "without cause" and denied severance (J.A. 27a, ¶ 38). Although he could have pled the national origin of these five employees upon information and belief, petitioner offered no information about them, or their national origin.[21]

Petitioner, therefore, could not present a single reason to infer that his employment was terminated because he was Hungarian or because he was not French.

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[20] There can be no claim with respect to citizenship. *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88-91 (1973).

[21] The five employees alleged to have received severance packages upon termination for cause were Jay Kubinak, Thilo Herda, Douglas Zale, Nigel Harley and Marcus Corbally. (J.A. 27a, ¶ 38). None of the names indicated that they were of French extraction, and petitioner did not so allege. The district court pressed petitioner to provide some information about these individuals from which an inference of discrimination could be drawn, but petitioner did not do so (J.A. 42a, 45a).

2. The Complaint Did Not Allege Age Discrimination.

There were no grounds to infer that petitioner was discharged because he was over 40 years of age.

With respect to age, petitioner alleged only that (i) at the time he left Sorema, he was 50 years old, (ii) Mr. Chavel was also 50, and (iii) Mr. Papadopoulo was 33 (J.A. 20a-21a, ¶¶ II, III). He also admitted that he was over 40 when he was hired by Mr. Chavel (J.A. 24a ¶¶ 13, 17).

These allegations presented no reason to infer age discrimination. In fact, they supported the contrary inference -- that petitioner's age was irrelevant to Sorema. Mr. Chavel, the alleged discriminatory actor, was the same age as petitioner. *See Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996); *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1337 (8th Cir. 1996); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1471 (11th Cir. 1991).

In addition, petitioner was 42 years old when he was hired. When an employer knowingly hires an individual who is within the protected class, it is presumed that the employee's subsequent termination was not motivated by discrimination. *See Rothmeier*, 85 F.3d at 1337; *Brown*, 82 F.3d at 658; *Proud v. Stone*, 945 F.2d 796, 798 (4th Cir. 1991).

Finally, petitioner did not allege, even upon information and belief, the ages of any of the five individuals he claimed were given severance packages (J.A. 27a, ¶ 38).

Thus, there was no reason to infer that petitioner was discharged because of his age either.

B. Petitioner's Time-Barred Allegations Should Not Be Considered.

Title VII and the ADEA require a plaintiff to file a charge of discrimination with the EEOC within 300 days after the "alleged unlawful employment practice" occurred. 42 U.S.C. § 2000e-5(e)(1); *Equal Employment Opportunity Comm'n v. Commercial Office Prods. Co.*, 486 U.S. 107, 122-25 (1988). Petitioner filed his EEOC charge on July 11, 1997 (J.A. 23a, ¶ 8). Therefore, only acts that took place within the prior 300 days, *i.e.*, after September 14, 1996, are timely for purposes of Title VII and the ADEA.

Petitioner's complaint focused on events that supposedly happened well before September 1996. The complaint alleged that (i) "in February 1995", certain of petitioner's underwriting responsibilities were "transferred" to Mr. Papadopoulo, a 32-year old French national of Greek heritage (J.A. 25a, ¶ 19); (ii) in "February 1996", Mr. Papadopoulo was appointed chief underwriting officer (J.A. 25a, ¶ 21); and (iii) "at the time", Mr. Chavel stated that he "wanted to 'energize' the underwriting department" (J.A.25a, ¶ 23). These allegations were untimely and could not be used to support petitioner's claims.[22]

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[22] The lower courts were generous to petitioner and considered these allegations. However, the time-barred (Continued...)

Again, this Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), is on point. In *Ricks*, the plaintiff's discriminatory discharge claim relied on prior events involving his denial of tenure, which were outside of the limitations period, to show the alleged discrimination. The Court refused to consider the time-barred allegations, and dismissed the plaintiff's discharge claim because it did not allege an inference of discrimination.[23]

The Court confirmed that "'[t]he proper focus is upon the time of the *discriminatory acts*", and "[t]he emphasis . . . 'is [upon] whether any present violation exists'". *Ricks* at 258. Accordingly, a discrimination claim must stand or fall on its own terms and cannot be buttressed by time-barred events. *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977) (holding that the allegedly discriminatory acts occurring outside the filing

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events did not give rise to an inference of discrimination with respect to petitioner's separation from the company in 1997.

[23] In order to avoid the statute of limitations, the plaintiff in *Ricks* sought to assert a continuing violation -- commencing with his denial of tenure and continuing through his termination of employment. The Court rejected this argument because "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination", and because the plaintiff did not identify the "alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment". *Ricks* at 257. Petitioner has never claimed a continuing violation, and such a claim would nevertheless fail for the same reasons that it was inadequate in *Ricks*.

period are "merely . . . unfortunate event[s] in history [with] no present legal consequences . . . [T]he critical question is whether any present violation exists"). *See also Watson v. Eastman Kodak Co.*, 235 F.3d 851 (3d Cir. 2000); *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428 (11th Cir.), *cert. denied*, 525 U.S. 962 (1998).

Petitioner's claims suffered from this defect. His complaint was based on events relating to his "demotion", which were beyond the limitations period. The allegations concerning his termination of employment were purely conclusory, and set forth no facts suggesting discrimination. Accordingly, this is a situation where "the court can reliably determine from the pleadings that the claim has no merit". Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 Tex. L. Rev. 1749, 1759 (June 1998).

Thus, the only cognizable allegations concerning petitioner's termination of employment did not show any discrimination, and his discharge claim was insufficient to state a claim.

* * *

As each court that has reviewed petitioner's complaint has found, there was no basis to infer that petitioner's discharge was due to impermissible considerations. The *only* inference arising from the complaint is otherwise -- that petitioner himself caused the termination of his employment by sending an ill-considered memorandum to his superior giving notice of his resignation. Reviving petitioner's claims would be both unjust and unjustifiable. It would also compel the lower courts

to hold that discrimination claims, no matter how preposterous and unfounded on their face, automatically state a claim and that substantial time and resources must be invested before an employer can obtain their dismissal.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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